courts early recognized the injured seaman's right to "care and cure" independent of fault.[5] The early law of the sea which gave birth to this doctrine allowed no further rights to disabled seamen. The comparatively recent introduction into maritime law of doctrines giving additional rights in certain cases of injury is, therefore, except when based on statutes, somewhat of an historical aberration.[6] This doctrine as developed in America finds its basis in the common law tort—the courts applying the analogy of the common law duty of a master to provide for his servants a safe place in which to work.[7] The American rule, accordingly, may be stated to be that a seaman who recovers damages for personal injuries from the shipowner does so upon the ground of the latter's "negligence," and that such "negligence" consists in failure to furnish a seaworthy ship, properly manned and equipped.

Although it is equally clear that personal negligence of the shipowner, or rather lack of it, underlies his right to limit liability under our statutes,[8] the conclusion of the court in the principal case is not found to be altogether unreasonable when we recall that the common law of master and servant imposed upon the former an affirmative, non-delegable duty to provide a safe working place.[9]

With regard to limitation of liability, the case is clearly to be distinguished from those cases in which a shipowner was not allowed to limit his liability for damage resulting from unseaworthiness when such liability was based upon a contractual promise.[10]

W. C. B.

ATTACHMENT: RELEASE OF SURETIES ON BONDS DISSOLVING ATTACHMENTS—Under what circumstances will an amendment of the complaint discharge the sureties on a bond given to dissolve an

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[5] The Osceola (1903) 189 U. S. 158, 47 L. Ed. 760, 23 Sup. Ct. Rep. 483; Harden v. Gordon (1823) 2 Mason 541, Fed. Cas. No. 6,047.

[6] Learnedly discussed in the opinion of Judge Addison Brown in The City of Alexandria (S. Dist. N. Y., 1883) 17 Fed. 390, 393. The doctrine as incorporated into British law by statute is based upon implied contract. Merchant Shipping Act of 1876, 39 & 40 Vict., c. 80, § 5.

[7] Thompson Towing & Wrecking Assn. v. M'Gregor (Circ. Ct. App., 6th Circ., 1913) 207 Fed. 209, 124 C. C. A. 479; The Mars (Circ. Ct. App., 3d Circ., 1907) 149 Fed. 729, 79 C. C. A. 435. For a discussion of the theory of the rule see The Neptuno (S. Dist. N. Y. 1887) 30 Fed. 925; also, Cornell Steamboat Co. v. Fallon (Circ. Ct. App., 2d Circ., 1909) 179 Fed. 293, 102 C. C. A. 345; The Fullerton (Circ. Ct. App., 9th Circ,, 1908) 167 Fed. 1, 92 C. C. A. 463; see also, opinion of the principal case, supra, n. 1, 269 Fed. at 339.

[8] Supra, n. 2. The Republic (Circ. Ct. App., 2d Circ., 1894) 61 Fed. 109, 9 C. C. A. 386. See, however, La Bourgogne (1907) 210 U. S. 95, 52 L. Ed. 973, 28 Sup. Ct. Rep. 664. For a discussion of the doctrine of limitation of liability in the light of recent cases see note, 8 California Law Review, 336.

[9] Kreigh v. Westinghouse & Co. (1909) 214 U. S. 249, 53 L. Ed. 984, 29 Sup. Ct. Rep. 619; Kain v. Smith (1880) 80 N. Y. 458.

[10] Luckenbach v. W. J. McCahan Sugar Ref. Co. (1918) 248 U. S. 139, 63 L. Ed. 170, 39 Sup. Ct. Rep. 53. See Great Lakes Towing Co. v. Mill Transp. Co. (Circ. Ct. App., 6th Circ., 1907) 155 Fed. 11, 16, 83 C. C. A. 607, 22 L. R. A. (N. S.) 769. Cf. supra, n. 8.

attachment? In *Turner v. Fidelity and Deposit Company of Maryland*,[1] an action against a surety on such a bond, the court found that the amendment of the complaint in the action in which the bond had been given, constituted a "material" variation of the principal's obligation which entirely discharged the surety.[2] In its statement of this general rule of suretyship as applied in such cases the court was clearly correct,[3] but in applying the rule as working a complete discharge of the sureties it adopted a technical and extremely conservative view—overlooking, it is submitted, the opportunity of reaching a result more in conformity with substantial justice and the real intention of the parties.

The general rule that any alteration of the contract between creditor and principal discharges the surety unless assented to by him is based upon the elementary principle that consent is the basis of contractual liability. When applied to the form of suretyship found in bonds given to dissolve attachments the rule is stated that any amendment of the complaint which shifts plaintiff's claim for recovery to an entirely new cause of action is a "material" variation of the original undertaking of the surety, which, without his assent thereto, will discharge him.[4] Two questions, however, arise in this connection: first, the question of fact, When is a new cause of action introduced? and, second, Will the introduction of a new cause of action entirely discharge the sureties although recovery in part is had upon items set forth in the original complaint? In their determination of these questions we find a cleavage among the authorities into what may be termed a liberal and a conservative view. The weight of authority and reason inclines towards liberality.[5]

In the principal case there can be no doubt but that the amendment of which the sureties complained introduced new causes of action. In accord with the conservative view the result of this case is to discharge the sureties in toto—even as to items of the original complaint embraced in the final judgment. It is submitted that there is no reason for so discharging the sureties. Their very contract being to underwrite the bond dissolving the attachment

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[1] (Jan. 21, 1921) 34 Cal. App. Dec. 347, 194 Pac. 58, reversing 33 Cal. App. Dec. 428. Hearing granted in Supreme Court Mar. 21, 1921.

[2] For the general rule see 1 Brandt, Suretyship and Guaranty (3rd ed.), §§ 416 ff. The codification of the rule in California (Cal. Civ. Code, §§ 2819, 2840) has been strictly construed. First Congregational Church v. Lowrey (1917) 175 Cal. 124, 165 Pac. 440, criticised by Professor Orrin K. McMurray in note, 6 California Law Review, 80.

[3] Michelin Tire Co. v. Bentel (1920) 60 Cal. Dec. 565, 193 Pac. 770; Cassidy v. Bank (1907) 7 Ind. Terr. 543, 104 S. W. 829. The general doctrine as applied in cases of attachment bonds is stated and the authorities are collected in a note, 42 L. R. A. (N. S.) 484.

[4] Supra, n. 3.

[5] Note, 42 L. R. A. (N. S.) 484. For instances of liberality see Townsend Natl. Bank v. Jones (1890) 151 Mass. 454, 24 N. E. 593; Driscoll v. Holt (1897) 170 Mass. 262, 49 N. E. 309; Morton v. Shaw (1906) 190 Mass. 554, 77 N. E. 633; also, cases cited infra, n. 6.

which issued upon the cause of action stated in the original complaint, why should they not be held upon so much of their contract as can be traced in the judgment? Although this result is possible only in cases in which the demands are severable and permit those embraced in the original complaint to be traced in the final judgment, it seems that to hold the surety in a proper case for the items of the original complaint which can be traced, is only to give effect to the contract of suretyship which the parties made. Authority supports this view.[6] *W. C. B.*

ATTACHMENT: ISSUES FOR BREACH OF CHARTER PARTY—In the March number of the REVIEW comment was made upon *Greenebaum v. Smith,*[1] which held that an attachment could not issue under the code provision in California[2] in a suit for breach of charter party to supply a cargo and pay freight upon the same. The basis of the decision was that since the amount of damages was unliquidated, it was not a contract for the direct payment of money.

While the former note was in print, the court on rehearing[3] reversed its former holding and held the attachment valid on the ground that the code provision does not require that the amount due shall appear upon the face of the contract itself. It is sufficient if "such damages are easily ascertainable according to fixed standards supplied by the contract or the law acting upon it." Shipping men, take heart again! *L. E. K.*

In connection with the decision of the principal case it is interesting to note that a *vendor* may sue and attach the vendee, if there is a breach by the latter, but that a *vendee* has not a similar right in the event of a breach by the vendor.[4] In reviewing the development of this doctrine, certain leading cases and principles are worthy of comment.

First, an attachment will lie for a breach of contract;[5] second, the contract itself must furnish the basis for estimating the damage;[6] third, the actual amount of damage, however, need not appear in the contract—the contract need only furnish the basis or standard for estimating this amount, and proof may be necessary

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[6] Note, 42 L. R. A. (N. S.) 484. Warren v. Lord (1881) 131 Mass. 560; Seeley v. Brown (1833) 31 Mass. (14 Pick.) 177. See also, Commonwealth v. Baxter (1912) 235 Pa. 179, 84 Atl. 136, 42 L. R. A. (N. S.) 484; Gregory v. U. S. Fidelity etc. Co. (1919) 185 Pac. 35 (Kan.) (replevin bond).

[1] (Oct. 7, 1920) 33 Cal. App. Dec. 307. See 9 Califoronia Law Review, 229.

[2] Cal. Code Civ. Proc. § 537.

[3] (Mar. 8, 1921) 34 Cal. App. Dec. 746.

[4] Willet & Burr v. Alpert (1919) 58 Cal. Dec. 523, 185 Pac. 976.

[5] Donnelly v. Strueven (1883) 63 Cal. 182. See also cases in note 7, infra.

[6] Hathaway v. Davis (1867) 33 Cal. 161.